

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES

WASHINGTON, D.C. 20548

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98510

FILE: B-184850

DATE: March 9, 1976

MATTER OF: Aerospace Engineering Services Corporation

DIGEST:

1. Unsupported allegation that successful offeror possessed or knew of certain drawings and documentation that were purposely withheld from other competing firms does not provide adequate basis for sustaining protest where procuring activity persistently denies existence of such data and protester presents no clear and convincing evidence to contrary. Fact that successful offeror had previously performed similar contract for same activity and its cost proposal under instant procurement was substantially lower than protester's does not substantiate protester's claim of favoritism or existence of documents in question in preparation of low offer.
2. Although successful offeror may have developed large data base of information and experience because of its previous contracts resulting in firm submitting substantially lower offer, such fact is not prejudicial to acceptance of its offer since Government awards contracts on basis of most advantageous offer and is not required to equalize competition by taking into consideration competitive advantage accruing to firms by reasons of their own incumbency or particular circumstances which do not result from preferential or unfair treatment.
3. Although we are advised that prospective contractor proposing equipment furnished under previous procurement is permitted, in lieu of complying with solicitation's requirement for submission of "provisioning documentation" with proposal, to complete its own "Certificate of Prior Submission" indicating to procuring activity that such information had been previously furnished for identical equipment under earlier procurement,

where, as here, activity is procuring "provisioning documentation" itself, protester's reference to absence of certificate is inappropriate and allegation that absence thereof substantiates claim is without merit.

4. Protester's failure to receive formal copy of amendment is not fatal to award of contract where there is no reason to believe that such failure was result of conscious or deliberate attempt on part of Navy to exclude protester from competition in light of record which indicates that draft copy of amendment was mailed to protester and shortly thereafter, formal copies of amendment were issued to all firms on bidder's mailing list although unbeknownst to contracting officer protester was not on such list.
5. GAO will not disturb award of contract made pending protest since record indicates that agency made necessary determinations and findings regarding urgency of award notwithstanding that administrative report was issued beyond 25-day period set forth in our Bid Protest Procedures.

Aerospace Engineering Services Corporation (Aerospace) protests the award of a contract to Booz-Allen Applied Research (Booz-Allen) under request for proposals (RFP) N00600-75-R-5942 issued by the Naval Regional Procurement Office, Washington Navy Yard. The RFP, as amended, solicited proposals for the preparation of a specified quantity of (1) operation and maintenance manuals and (2) provisioning technical documentation for the Precise Time and Time Interval (PTTI) equipment incorporated in the VLF Time Standard Distribution System (TSDS) at the Naval Radio Facility (NRF), Annapolis, Maryland; (3) technical manuals for the Time Transfer Unit and (4) test troubleshooting and repair procedures for field maintenance of Cesium and Rubidium Frequency Standards. The RFP requested that only price proposals be submitted and contemplated that award of the resulting contract would be to the low responsible offeror. Only Aerospace (although not on the bidder's mailing list) and Booz-Allen submitted timely offers (\$170,453.70 and \$95,380, respectively) by the amended closing date established for receipt of proposals. The record indicates that both firms submitted additional technical information which in addition to the vast price discrepancy between the two proposals necessitated that the Naval Electronic Systems Command (NAVELEX) Engineering Center evaluate both offers to determine if each conformed to the specifications and were based on the same

interpretation of the scope of work. NAVELEX reported that both offers satisfied the above except that Aerospace's proposal was contingent upon the Government providing drawings which were not available.

Aerospace alleges that Booz-Allen "had in its possession or knew of the existence and/or contents of certain drawings and documentation" related to PTTI equipment which were not made available to all competing firms and that the Navy procuring officials persistently denied the existence of such data during the course of the procurement. The protester further alleges that Booz-Allen received favored treatment because of the firm's previous contract with the Navy to document identical or similar PTTI equipment (located in Oahu, Hawaii) which Aerospace claims "involved the use of the so called 'non-existent drawings'". In this regard, Aerospace states that its contention that the aforementioned drawings and documentation created by Booz-Allen under its previous contract were purposely withheld and not made available to other offerors is substantiated by the omission of a "Certificate of Prior Submission" from the solicitation. In addition, Aerospace maintains that it never formally received Amendment 0002 to the RFP (it received only a telephone transmission of the contents thereof) and that the PTTI equipment listed in the amendment differed from the list of equipment Aerospace compiled during its visit to the NRF site to examine the PTTI equipment and which was supposedly employed in the formulation of the equipment list set forth in the amendment.

The record indicates that shortly after the issuance of the RFP, Aerospace requested prints, schematics, etc. for all the PTTI equipment incorporated in the VLFTSDS, located at the NRF. The procuring activity has consistently maintained that the majority of PTTI equipment was custom-built by the Naval Research Laboratory and that final documentation was not produced at such time. The only drawings and documentation available for the Annapolis VLF site are installation documentation (incomplete schematic and system diagrams) and manuals for the commercial equipment in the system, all of which were made available to Aerospace.

Furthermore, the Navy states that while Booz-Allen has developed a large data base of information and experience resulting from its previous contracts with NAVELEX, the firm does not have in its possession any Government drawings or documentation which were not made available to all other offerors. Therefore, since

the documentation requested by Aerospace does not and never did exist, it was impossible for the procuring activity to satisfy the protester's demand for such information. Moreover, the Navy denies that Booz-Allen was given favored treatment since, as the Navy points out, both amendments to the RFP were issued as the result of the protester's request for change or clarification. While the Navy concedes that Booz-Allen performed a contract for NAVELEX at the VLF site in Oahu, Hawaii, the contract was for an operational maintenance manual for the PTTI Test Bed equipment which is not a part of the subject VLFTSDS located at the Annapolis site and the only information existing was installation documentation and commercial manuals for the PTTI equipment which were made available at the NRF.

Based on our review of the evidence of record, we cannot conclude that Aerospace was at a competitive disadvantage because Booz-Allen possessed or knew of the existence or contents of drawings and documentation relating to PTTI equipment which were not known to exist or made available to other competing offerors. In order to controvert the Navy's position that data of the nature requested by Aerospace and alleged to have been utilized in the preparation of Booz-Allen's offer does not and never has existed, the protester must present clear and convincing evidence to the contrary. Mere allegations and unsupported suspicions based on Booz-Allen's low offer is not enough to cast doubt on the Navy's representation or cause our Office to suspect the existence of the information in question. In the absence of any probative evidence, we are unable to conclude as alleged that documentation of the nature requested by Aerospace relating to the PTTI equipment is or in fact ever was in existence at the time the RFP was issued and that such data was purposely withheld by the Navy to assure an award to Booz-Allen,

Furthermore, there is nothing in Aerospace's protest to support its contention that Booz-Allen received favored treatment because of the firm's previous contract with the Navy. While it is conceivable that Booz-Allen had developed a large data base of information and experience that enabled the firm to submit an offer below that submitted by Aerospace, the protester has presented no evidence to our Office to show that Booz-Allen possessed or had at its disposal the subject documentation and information during the previous or present procurement. Such a speculative and conjectural argument does not provide an adequate basis for sustaining a protest.

In this regard, we have long recognized that certain firms may enjoy a competitive advantage by virtue of their own incumbency or their own particular circumstances or as a result of Federal or other public programs. B-175496, November 10, 1972; B-175834, December 19, 1972; Houston Films, Inc., B-184402, December 22, 1975, 75-2 CPD 404. As we said in B-175496, supra:

"* * * it is obviously not possible to eliminate the advantage which might accrue to a given firm by virtue of other Federal, state or local programs. * * * We know of no requirement for equalizing competition by taking into consideration these types of advantages, nor do we know of any possible way in which such equalization could be effected."

Rather, the test to be applied is whether the competitive advantage enjoyed by a particular firm would be the "result of preference or unfair action by the Government." B-175834, supra. We see no evidence of any improper action in the conduct of the instant procurement.

In regard to Aerospace's contention that the omission of a "Certificate of Prior Submission" from Booz-Allen's proposal substantiates the claim that drawings and documentation created by that firm under a previous contract were purposely withheld from the other competing firms, our Office has been advised by the Navy that a document of the nature referenced by the protester is not required by either ASPR or its own procurement directives and, in fact, is not an official Government form. Rather, we have been informed that where a prospective contractor is competing for a contract to furnish equipment which it had supplied under a previous procurement and there is a corresponding requirement in the solicitation that "provisioning documentation" be submitted with the proposal, the offeror is permitted in lieu of submitting the requested information to complete its own "Certificate of Prior Submission" indicating to the procuring activity that "provisioning documentation" has been furnished for identical equipment with its proposal under the earlier procurement. By certifying to the above, the offeror is not required to resubmit the same information already in the possession of the Government. However, in this case, the Navy is not procuring commercial equipment, but, is in fact purchasing the "provisioning technical documentation" itself for the PTTI equipment at the NRF which was custom built by the NRL without corresponding final documentation. Therefore, under the circumstances of the instant procurement, Aerospace's reference to the absence of a "Certificate of Prior Submission" is inappropriate and its allegation that the absence thereof substantiates its claim as to existence of the drawings and documentation in question is without merit.

Addressing Aerospace's claim that it (and another firm on the original bidder's list from which it received its copy of the solicitation) failed to receive a formal copy of Amendment 0002, our Office has consistently held that the failure of a bidder or offeror to receive a solicitation or a copy of an amendment to a solicitation does not require a resolicitation or consideration of a bid or offer or modification received after the time fixed for opening of bids or receipt of proposals, unless such failure is the result of a conscious and deliberate effort to exclude the bidder or offeror from participating in the competition. AFB Contractors, Inc. B-181801, December 12, 1974, 74-2 CPD 329; B-176628 (1), January 24, 1973.

In her report upon the protest, the contracting officer states that on or about July 18, 1975, a draft copy of the amendment was mailed to Aerospace since the amendment was issued in response to its specific requests and that formal copies of the amendment were issued to all firms on the bidder's mailing list on July 21, 1975. While she states that it was not known at this time that Aerospace was not on the list of bidders, it was assumed the firm received the amendment since no complaint was received regarding its failure to receive the first amendment. Therefore, on the record before us, we have no reason to believe that the failure of Aerospace or any other offeror to receive the amendment was the result of any conscious or deliberate attempt on the part of the Navy to exclude them from competition. Furthermore, there is no evidence of record to substantiate Aerospace's claim that the PTTI equipment set forth in amendment 0002 differed from the list Aerospace compiled from its own examination of the equipment at the NRF or that Aerospace in fact ever presented the Navy with such a list prior to submission of its proposal.

Finally, Aerospace protests the awarding of a contract to Booz-Allen while its protest was pending before GAO. Specifically, Aerospace questions the urgency of the award in light of the fact that the Navy exceeded the 25-day period recommended by our Bid Protest Procedures for the submission of an administrative report on the protest. Our bid protest procedures provide:

"When a protest has been filed before award the agency will not make an award prior to resolution of the protest except as provided in the applicable procurement regulations. In the event the agency determines that award is to be made during the pendency of a protest, the agency will notify the Comptroller General." 40 Fed. Reg. 17979 (1975)

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The record shows that the Navy made the necessary written findings and determinations on October 8, 1975, and notice of intent to award was furnished our Office on October 23, 1975. In this regard, we have long recognized that our Office has no authority to require the withholding of an award pending a decision by our Office on a bid protest. In any event, since we have found no merit to the protest, the award prior to resolution of the protest has not worked to the detriment of Aerospace.

Accordingly, Aerospace's protest is denied.


Acting Comptroller General
of the United States